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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO ROSALES, Defendant and Appellant.	2d Crim. No. B205865 (Super. Ct. No. NA075025) (Los Angeles County)

Francisco Rosales appeals a judgment after his conviction of corporal injury to a spouse (Pen. Code, § 273.5, subd. (a)) with findings that he used a deadly weapon and personally inflicted great bodily injury. (§§ 12022, subd. (b)(1), 12022.7, subd. (e).) We conclude that: 1) the trial court did not err by admitting evidence of Rosales's prior convictions to be used as impeachment evidence, and 2) Rosales has not shown prosecutorial misconduct. We affirm.

FACTS

Sophia P. married Rosales in 2007. On July 18, 2007, she and Rosales were drinking beer together. They had an argument over the use of a cell phone. Rosales hit Sophia in the face with his fist and then he hit her three times in the head with a bottle.

Blanca Martinez, a neighbor, testified that she heard Sophia screaming for help. She went upstairs. Sophia told her that Rosales "was beating her up." Martinez

saw blood dripping from her head and forehead. Rosales told Martinez to mind her own business. He slammed the door on Martinez's face.

Police Officer Victor Larios testified that when he arrived at Rosales's apartment, Sophia "had blood all over her face." At the crime scene, there was a 12-ounce beer bottle that "had blood on it." Larios said that he did not know if that bottle was ever "fingerprinted."

Dr. Brian Fong, an emergency room doctor, testified that Sophia arrived by ambulance. Sophia said Rosales was responsible for her head injuries. She had facial lacerations, a broken nose, a broken "vomer" bone, swelling in her scalp, and the bridge of her nose was swollen. Dr. Fong said that her injuries were consistent with someone having hit her in the head multiple times with beer bottles.

Police Officer Aaron Eaton was the investigating officer on this case. He testified that Sophia's statements to police throughout the investigation of this incident were generally consistent.

In the defense case, Rosales testified that he did not hit Sophia. They had an argument about a cell phone, and Sophia told him to "fuck" his mother. He grabbed her hand while she was holding a beer bottle and sitting in a chair. Rosales said she "leaned back and then she hit herself with the same bottle." As her rocking chair leaned backwards, she collided with a coffee table which had sharp edges. On cross-examination, he testified that in 1997 he had been convicted of criminal threats and corporal injury to a spouse.

In rebuttal, Police Officer Jonathan Poon testified that after the police arrived at the scene, Rosales said that he was angry about what Sophia had said and he was "pushing her." He told Poon that Sophia "fell onto the family room floor and hit her head on a glass bottle." Rosales never said anything to Poon about grabbing Sophia.

DISCUSSION

I. *Admitting Evidence of Rosales's Prior Convictions*

Rosales contends that the trial court erred by admitting evidence about his prior 1997 felony convictions for criminal threats and corporal injury to a spouse. We disagree.

The trial court permitted the introduction of this evidence to allow the prosecution to impeach Rosales's credibility. Prior felony convictions involving moral turpitude may be introduced to impeach the credibility of a defendant who testifies. (*People v. Castro* (1985) 38 Cal.3d 301, 306.) Felony convictions for the crimes of criminal threats and corporal injury to a spouse involve moral turpitude. (*People v. Thornton* (1992) 3 Cal.App.4th 419, 424; *People v. Rodriguez* (1992) 5 Cal.App.4th 1398, 1402.) Rosales moved to exclude references to his prior felony convictions prior to testifying in his defense case. But a defendant who testifies is subject to impeachment and is not entitled to an exemption from cross-examination or a "'false aura of veracity.'" (*People v. Massey* (1987) 192 Cal.App.3d 819, 825.)

Rosales contends that this evidence was admitted "solely for the purpose of establishing that appellant was a person of bad character or disposition," and jurors considered this evidence for those purposes. We disagree.

The trial court instructed the jury, "If you find that a witness has been convicted of a felony, you may consider that fact *only in evaluating the credibility of the witness's testimony*." (Italics added.) The court therefore carefully and narrowly limited the way jurors could consider this evidence. The instruction properly prevented jurors from giving significance to extraneous and potentially prejudicial matters by limiting the use of the evidence exclusively to credibility issues. (*People v. Castro*, *supra*, 38 Cal.3d at p. 319.) We presume that the jury both understood and followed the court's instructions. (*People v. Holt* (1997) 15 Cal.4th 619, 662.) Rosales has not shown otherwise.

Rosales argues that the trial court should have "sanitize[d]" the prior convictions by only allowing jurors to know that he "had suffered prior felony convictions involving moral turpitude." But that could lead jurors to speculate about whether Rosales had committed more serious offenses than the ones for which he was convicted. (*People v. Castro*, *supra*, 38 Cal.3d at p. 319.) By not sanitizing the convictions in the way Rosales suggests, the trial court precluded any speculation that his prior offenses may have involved more heinous crimes. (*Ibid.*; *People v. Massey*, *supra*, 192 Cal.App.3d at p. 825.)

Rosales claims the court should have prevented jurors from learning that one of his 1997 felony convictions involved corporal injury to a spouse. But the court is not required to exclude a prior conviction as impeachment evidence simply because it involves the same type of crime charged in the current case. (*People v. Hinton* (2006) 37 Cal.4th 839, 888.) Rosales suggests that the jury would draw a connection between these cases and conclude that he had a propensity to commit domestic violence. But the two offenses were not connected, they were separated by 10 years, and the court's instruction precluded jurors from considering the prior conviction as propensity evidence.

Yet where a prior offense involves the same crime as the charged offense, there may be a potential for prejudice. (*People v. Muldrow* (1988) 202 Cal.App.3d 636, 647.) Courts reduce that risk by weighing the prejudicial impact of the prior against its probative value. (*Ibid.*) Here the trial court weighed these factors and found both priors were "more probative than prejudicial." The jury heard conflicting testimony from Rosales and Sophia. The prior convictions were "highly probative on the issue of [Rosales's] credibility." (*People v. Tamborrino* (1989) 215 Cal.App.3d 575, 590.) The court could reasonably find that excluding the prior corporal injury conviction would have given Rosales a false aura of veracity. (*People v. Hinton*, *supra*, 37 Cal.4th at p. 888.) It would have reduced the number of prior impeachment felonies by half, leading jurors to believe that he had only committed a single prior offense. The remoteness of a prior conviction is a factor. But "a 10-year-old conviction is not too

remote in time to be admissible under [Evidence Code] section 352." (*People v. Campbell* (1994) 23 Cal.App.4th 1488, 1497, fn. 14.) Moreover, because the prosecution did not dwell on the details of the prior offenses, the danger that the jury would see a connecting pattern was diminished. (*Id.*, at p. 1497.) Rosales has not shown an abuse of discretion.

But even if the court erred, the result does not change. Here any error is harmless. The reference to these prior convictions was brief and the jury did not hear any extended emotionally charged evidence about how Rosales abused his prior victim. (*People v. Campbell*, *supra*, 23 Cal.App.4th at p. 1497; *People v. Zataray* (1985) 173 Cal.App.3d 390, 401.) Moreover, the prosecution's evidence of Rosales's guilt was strong. Martinez's testimony corroborated Sophia's claims that Rosales had attacked her. The medical evidence supported Sophia's testimony about how she received her injuries. Dr. Fong said her injuries were consistent with being struck multiple times with beer bottles.

In addition, the jury did not find Rosales to be credible. His testimony about what happened during the incident was substantially different from his statements to Officer Poon. By contrast, Officer Eaton testified that Sophia's statements to the police throughout the investigation were generally consistent. Rosales has not shown a reasonable likelihood of a different result even had the trial court excluded his prior corporal injury to a spouse conviction. He was still subject to impeachment based on his prior felony conviction for criminal threats. (*People v. Williams* (1999) 72 Cal.App.4th 1460, 1465, fn. 8.)

II. *Prosecutorial Misconduct*

Rosales contends the judgment must be reversed because the prosecutor committed misconduct in his closing argument: 1) by improperly mentioning Rosales's prior conviction for corporal injury to a spouse, and 2) by suggesting that the defense had the burden to present fingerprint evidence. We disagree.

"Prosecutors 'are allowed a wide range of descriptive comment'" on the evidence. (*People v. Farnam* (2002) 28 Cal.4th 107, 168.) Misconduct is shown where their remarks were "so unfair" they denied the defendant a fair trial or where the prosecutor used "deceptive or reprehensible methods" to persuade the jury. (*Id*. at pp. 167-168.)

Rosales argues that the prosecutor committed misconduct by making a reference to his prior conviction and stating to the jury "you have the defendant that has been convicted of the same charge here PC 237.5 . . . spousal battery causing a traumatic condition." He claims this was an improper attempt to argue that he had a propensity for committing these offenses against spouses.

But we do not evaluate the remarks of prosecutors in isolation. We must view them "in the context" of the complete argument or point being stressed and whether they were responding to defense arguments. (*People v. Fierro* (1991) 1 Cal.4th 173, 247.)

Here the reference to the prior conviction was not made as part of a propensity argument. The prosecutor referred to the felonies in the context of a discussion about the credibility of two witnesses. He told jurors, "Has the witness been convicted of a felony? The court has given you an instruction. *And on the issue of credibility, again, you decide how credible, how not credible* . . . . But the instruction says someone convicted of a felony that His Honor gives you is relevant for you to consider among all the other things is this person truthful. [¶] Miss [P.] has no felonies. Nothing related to criminal history before you. On this element you have the defendant that has been convicted of *the same charge here* PC 237.5 . . . spousal battery causing a traumatic condition. . . . [¶] And also another felony of criminal threats, 422. *Those are there for you to consider on whether he is telling you the truth*." (Italics added.)

The prosecutor properly told jurors that they could consider the felonies in deciding Rosales's credibility. His use of the phrase "the same charge here" was unnecessary to his argument. But we conclude that this phrase, by itself, did not rise to

the level of being deceptive or reprehensible, nor did it deprive Rosales of a fair trial. (*People v. Farnam, supra*, 28 Cal.4th at pp. 167-168.) No reasonable juror would have interpreted that phrase as an invitation to ignore the court's instruction that the prior convictions could only be considered on the issue of credibility.

Rosales contends the prosecutor committed misconduct by telling jurors that the defense had the burden to present fingerprint evidence on the bottle. He notes that the prosecutor said, "*As counsel is saying I have no burden absolutely*. But when you want to use it as a sword, when you want to say, look, there is prints to imagine to you that that would exonerate the client. And willing to present it to you in this consideration, you need to realize that that is the position that they don't have anything but they are using it. If they use it why didn't they do it? They don't have to. But I am saying in an argument to say all this stuff that isn't here--they have the subpoena power." (Italics added.)

But Rosales has taken this quote out of context. He has omitted the two critical sentences that preceded these remarks where, referring to the defense, the prosecutor said, "*They don't have to prove anything. It is my burden*." (Italics added.) The statement "*I have no burden absolutely*" was the prosecutor's paraphrase of what defense counsel said to the jury. It was not a claim that the burden of proof had shifted to the defense. The prosecutor was responding to a defense argument that "[t]here has been no evidence presented to you that [Rosales's] fingerprints are on that bottle. If he hit her holding that bottle it would sure be a good chance his fingerprints would be on it." In response to this, the prosecutor went on to explain why there would be no useable prints. He said, "When you have a smear all over a bottle but there are no prints on that, it doesn't happen. Theory could, it doesn't. It is all over. It is not preserved."

Here there was no misconduct. "[P]rosecutorial comment upon a defendant's failure 'to introduce material evidence or to call logical witnesses' is not improper." (*People v. Wash* (1993) 6 Cal.4th 215, 263.) The prosecutor had the right to respond to the defense argument and identify omissions in the defense case. He could

explain to jurors why the lack of fingerprints on a beer bottle did not refute Sophia's testimony. His remarks were "within the broad range of permissible comment on the evidence." (*Ibid*.) He expressly and correctly told jurors that the prosecution had the burden of proof.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

Arthur H. Jean, Jr., Judge

Superior Court County of Los Angeles

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